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IN THE

Supreme Court of the United States

October Term 1965

No. 534

JOHN BATTAGLIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner John Battaglia respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming the judgment in part of the United States District Court for the Southern District of California, following his conviction by a jury on August 19, 1964, on the six counts on the violation of Title 18, Sections 2 and 1343, U.S.C. On September 2, 1964, the District Court rendered its judgment and pronounced sentence against petitioner and against his co-defendant Harold Tenner. Harold Tenner was sentenced to six months, but petitioner was sentenced to five years on each of the six counts, the sentences on Count I, II, III and IV to run consecutively to each other, and the sentence on Counts V and VI to run consecutively to

each other, but concurrently with the sentence imposed on Counts I and II.

From such judgment and sentence Battaglia appealed, but Tenner did not. On the 12th day of July, 1965, the Court of Appeals for the Ninth Circuit affirmed Battaglia's conviction on Counts I and II, but reversed the conviction and sentence on Counts III, IV, V and VI. A Petition for rehearing was duly filed by Battaglia and was denied by the Ninth Circuit Court on August 6, 1965.

A copy of the judgment and sentence is set forth in Appendix "A"; a copy of the judgment affirming the conviction on Counts I and II and reversing the conviction on the remaining counts is set forth as Appendix "B"; a copy of the Circuit Court opinion which is as yet unreported is attached hereto as Appendix "C"; and a copy of the order denying the petition for rehearing is attached hereto as Appendix "D".

Grounds on Which the Jurisdiction of This Court Is Invoked.

The petitioner was convicted for violation of the federal statute for using the wire to defraud through the means of telephone conversations allegedly in violation of Sections 2 and 1343 of Title 18, U.S.C. The judgment and sentence was affirmed by the Circuit Court on July 12, 1965.

The petition for rehearing being timely, was denied on August 6, 1965, by the Ninth Circuit Court. The Circuit Court had jurisdiction under Title 28, Sections

1291 and 1294, and the section under which it is believed that this court has jurisdiction is Section 1254 of Title 28, U.S.C. to review the judgment in question.

Questions Presented for Review.

1. Whether the court erred in permitting Sgt. Thompson of the San Diego Police to testify to a conversation overheard by him through the use of a radio transmitter concealed on the person on Warrens, which conversation took place on March 22, 1963, in the hotel room of petitioner Battaglia, at which time Battaglia, Warrens and one Dave Williams were present. Was not the use of such transmitter in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution?

2. Whether the court's permitting the tape recording of such conversation to be admitted in evidence is in violation of the Fourth, Fifth and Sixth Amendments of the Constitution?

3. Whether the court erred in refusing to require the Government to permit an inspection of the purported typewritten transcript of the tape of the conversation which took place in Battaglia's hotel room aforesaid, from which typewritten transcript Williams testified he refreshed his recollection before testifying. Was not the refusal to permit such inspection in violation of *Title 18, Section 3500* U.S.C. and a denial to petitioner of a fair trial and due process under the Fifth Amendment of the Constitution?

4. Whether the court erred in permitting portions of the transcript of the testimony of Harold Tenner, Battaglia's co-defendant, before the Grand Jury to be read to the jury, and whether this was in violation of the Fifth and Sixth Amendments of the Constitution?

5. Whether the Assistant United States Attorney was guilty of misconduct in his argument to the jury in referring to petitioner as "Johnnie B", and whether the court erred in refusing the request of the attorney for Battaglia to instruct or admonish the jury with respect to such misconduct, was not this a denial to Battaglia of a fair trial and due process as required by the Fifth Amendment of the Constitution?

6. Whether the court erred in admitting against Battaglia, testimony of conversations between Tenner and Warrens and between Tenner and certain Government agents in connection with Counts III, IV, V and VI? The admission of such testimony against Battaglia was highly prejudicial and denied him a fair trial and due process under the Fifth Amendment of the Constitution.

Constitutional Provisions and Statutes Involved.

Defendants were convicted under Section 2 and Section 1343 of Title 18, U.S.C.

Fourth Amendment to the Constitution.

Fifth Amendment to the United States Constitution.

Sixth Amendment to the United States Constitution.

Title 18, Section 3500, U.S.C.

A copy of the aforesaid statutes and constitutional provisions are set forth in Appendix "D".

Statement of Facts Pertinent to the Determination of the Petition.

In January, 1963, the petitioner Battaglia, a resident of Los Angeles, met a Dr. Kenneth Warrens, a dentist in San Diego, at San Diego. Battaglia stated that he understood Warrens had lost considerable money betting on horse racing and that he had a sure way of recouping these losses, but would need $5,000.00 from Warrens to do so.

For several months prior to meeting Battaglia, as well as during some of the time that they were in contact with each other, Warrens had bet heavily with bookmakers, or supposed bookmakers, some of whom he never saw again, and had lost heavily. On the stand, he also admitted that "with the two other bookies" (description given by the witness) he was working with the scheme of the invisible ink and bet "to cheat other bookies" and to cheat the owners of the Agua Caliente race track, and that he was willing to do anything to get money, honestly or dishonestly [R. T. 114-115, 117, 120, 122].

At the meeting Battaglia said that sure-fire bets could be placed on horse races already run, so later Warrens gave him $5,000.00 to make bets on a horse race already run. In the latter part of January, a man claiming to be Harry Mellon (later identified as Harold Tenner) called Warrens from Las Vegas stating that he was recognizing a deposit of $15,000.00, and that Warrens would have an account symbol of JWS. On February 5, pursuant to previous directions by Battaglia, Warrens called Las Vegas from a phone booth at San Diego and at 4:00 o'clock on the same day Battaglia called Warrens at the same place telling him

that they would be going on the seventh at Santa Anita and that the winning horse number was 215, post position 2. Warrens then called the Las Vegas number and left a call for Mellon. After reaching him, Warrens stated that he wanted to place a $15,000.00 bet on Rabellaro. The next day Battaglia called Warrens and said the horse did not win.

Later in February, Battaglia told Warrens that "Doug" would probably do the betting once more, but that the bet should be $20,000.00 to insure recovery of the previous loss, with each one of them to put up $10,000.00. Warrens claimed to have put up $10,000.00 first, and then an additional $4,000.00.

Warrens came to Los Angeles on March 11th, met Battaglia and they went to Burbank, a suburb of Los Angeles. There they located two phone booths side by side. They placed calls simultaneously to the Las Vegas number, purportedly to Harry Mellon. A call was returned and Warrens told the man at the other end of the line to bet $20,000.00. Ten minutes later a call came to Warrens and the voice of Mellon said, "JWS, the horse came in out of the money".

The next day Battaglia called Warrens and said Mellon was able to change the bet, but the only way to get him paid off was to change the bet to $30,000.00, and this had to be on deposit before the bookmaker would honor the bet. Warrens arranged with a friend, Dave Williams, to get $9,000.00 additional to Battaglia. Warrens agreed to repay Williams the money within a

few days, stating that the money was on deposit with a bookmaker and he would have to wait for the return. Later Mellon called Warrens in San Diego and said that he would see Warrens the following Monday, but he never showed up.

On March 22, Williams went to San Diego to collect his loan and talked to Warrens. The two of them then went to the San Diego Police where they told their story. Sgt. Thompson of the San Diego police then equipped Warrens with a transmitting device, hidden on his person and Warrens and Williams went to call upon Battaglia at his motel room at the Town and Country Motel in San Diego. Sgt. Thompson followed in a truck with recording equipment to pick up the transmission from the hidden trasmitter. Williams testified that they went to try to trap Battaglia into making admissions [R. T. 299].

Sgt. Thompson, some distance away in the equipment truck listened to and caused to be recorded on a tape [Ex. 1] the conversation, which took place in the motel room of Battaglia, between Battaglia, Williams and Warrens. Over objection of Battaglia, Sgt. Thompson was permitted to testify as to what he overheard [R. T. 274-299]. The tape recording of the conversation was also admitted over objection of defendants in evidence. Portions of the tape were unintelligible due to static and other interferences. A considerable part of Battaglia's statements were not sufficiently audible to be understood [R. T. 79-81, 86, 87].

Later in the day, Warrens called Battaglia and this conversation was taped through a recording device attached to the telephone. In the conversation, Battaglia stated that he had hopes of getting back Warrens' money. Twice the week following March 22nd, Battaglia called to reassure Warrens. Battaglia had been interested in some business propositions one of which was development of a sky-shooter (a small helicopter), and the other with a certain ranch known as the Bar-H Ranch. While Battaglia did not take the stand, Williams and Warrens testified that Battaglia had discussed with Warrens the possibility of getting money to finance the two projects. On the 27th of March, Warrens mailed back to Battaglia the Articles of Incorporation of Sky-Shooter, Inc. Thereafter there were no telephone calls or other communications between Battaglia and Warrens.

However, in between May 27th and June 3, 1965, Mellon (Harold Tenner), the co-defendant of Battaglia, called Warrens from Reno, Nevada, to attempt to have Warrens advance him $2,000 to bet on horses. During the conversations he told Warrens not to say anything to John Battaglia. The four telephone conversations which Tenner, alias Mellon, had with Warrens were the basis of Counts III, IV, V, and VI. There was no evidence whatever connecting Battaglia with such counts, and hence the reversal by the Ninth Circuit of Battaglia's conviction on said counts. Objection was made repeatedly by Battaglia's counsel as to the admis-

sion of evidence with respect to said counts and to conversations between the FBI and other Government agents and Tenner, as well as to the testimony of Warrens as to telephone conversations with Tenner. The admission of this testimony against Battaglia was highly prejudicial.

Prior to the trial, the Government made a purported transcript of the tape recording of the conversations obtained through the use of the transmitting device. The day before the trial, Williams, who was the principal witness as to the conversation which took place on March 22nd in Battaglia's hotel room, was permitted to refresh his recollection from the typewritten transcript made by the Government. Since Williams' testimony was in conflict with Sgt. Thompson's testimony as to the conversation which took place, Battaglia's counsel demanded the inspection of the typewritten transcript, but the Government refused this demand and the Government's objection was sustained [R. T. 329-330].

At the trial, the defendant Tenner took the stand and testified on his own behalf and on behalf of Battaglia [R. T. 611-649]. His testimony was, on the whole, quite favorable to Battaglia. Some of it tended to absolve Battaglia not only in connection with Counts III, IV, V, and VI, but also to a certain extent it cleared him of charges under Counts I and II. The Government then in order to impeach Tenner, produced in evidence over objection by Battaglia's counsel, as well as Tenner's counsel, a portion of the transcript

of Tenner's testimony before the Grand Jury, which indicted the two of them [R. T. 632-649]. The testimony of Tenner before the Grand Jury was somewhat in conflict with his testimony on the stand at the trial. A motion to strike the portion of the transcript of Tenner's testimony before the Grand Jury was denied [R. T. 643-649].

When Tenner appeared before the Grand Jury he was not represented by an attorney. Prior to the time he entered the Grand Jury room he did not know that he was a potential defendant in the case, nor was he informed of his constitutional rights. On the stand Tenner admitted that what he testified to before the Grand Jury room was not correct, not that he was scared due to the fact that he was trying to be a bookmaker and solicit in Las Vegas or Nevada without a license. In the Grand Jury room Mr. Tenner began by claiming the Fifth Amendment when he was asked if he knew Harry Mellon, and then subsequently after various warnings made by the Assistant United States Attorney, concerning perjury and the powers of the Grand July, he denied that he was Harry Mellon.[1]

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[1]The portion of the testimony before the Grand Jury which was read over objection and concerning which the motion to strike was denied is found in the Reporter's Transcript pp. 634, 635, 636, 642.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING THE SAME.

I.

Certiorari Should Be Granted to Settle the Important Question, Never Directly Before Passed Upon by This Court, Whether the Use of Evidence Obtained by Means of an Electric Transmitting Device Concealed Upon a Person Entering a Private Room or Home of a Defendant Was Unlawful and Violative of the Rights of the Defendant Under the Fourth and Fifth Amendments to the Constitution, and Also Violative of the Sixth Amendment to the Constitution Where It Was Used to Obtain Admissions or Confessions on the Part of the Defendant for Purposes of Prosecution.

The use of such a transmitter was in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution. The evidence given by Sgt. Thompson was important to the Government's case, as was indicated by the United States Attorney in calling attention to the fact that it corroborated the testimony of Williams and Warrens.

Warrens and Williams went to the San Diego Police Department on March 22, after a conversation between themselves and pictures were shown to them by the officers of Battaglia. It was then arranged by the police that Warrens would be equipped with a recording device being in the nature of a hidden transmitter concealed upon his person, that Warrens was to go to Battaglia's hotel room at the Town and Country Motel in San Diego, together with Williams. They went to the room of Battaglia [R. T. 62-63; 343, 344]: Sgt. Thompson followed in another vehicle containing a de-

vice for receiving the transmitted conversation [R. T. 63]. Sgt. Thompson's car was parked a short distance from the hotel room equipped with a transmitting and receiving device. He was able to make a recorded tape of the conversation between Warrens, Williams and Battaglia, but he also plugged into the receiving device and was able to listen to the conversation [R. T. 76-81, 274], They of course were able to obtain admittance to Battaglia's room by reason of their acquaintanceship and dealings. Officer Thompson was permitted, over objection, to testify as to what he heard [R. T. 276-281]. We contend this was violative of Battaglia's constitutional rights. The Fourth and Fifth Amendments to the United States Constitution have long safeguarded a person's home from invasion by government officials, unless such transgressions were justified by a search warrant supported by probable cause an effected arrest and an incident search or consent of the homeowner. There was no such justification in this case.

See:

Agnello v. United States, 269 U.S. 20 (1925);
Taylor v. United States, 286 U.S. 1 (1932);
Johnson v. United States, 333 U.S. 10 (1948);
McDonald v. United States, 335 U.S. 451 (1948);
Jones v. United States, 357 U.S. 493 (1958);
Chapman v. United States, 365 U.S. 610 (1960).

We contend that *On Lee v. U.S.,* 343 U.S. 747, is no longer authority for the invasion of a man's room by a friend or acquaintance equipped with an electronic transmitting device, and that this case affords an opportunity for the court to once and for all end any dispute about the right of a Government agent to enter a

man's home (in this case his home away from home, a motel room). It was a private room of Battaglia's and there is clearly a distinction between recording a conversation on a person who enters a public establishment with a hidden transmitter and one who enters a person's private room or home under the cloak of a visit or business conversation. In the Solicitor General's brief in *On Lee, supra,* at page 29 thereof, it said this:

> "The various situations envisaged in the dissenting opinion where mechanical contrivances are used to publish conversations within a private home are unrelated to the present case. As has been observed above, a private home is not involved; the conversation took place in a place to which the public was invited."

Silverman v. United States, 365 U.S. 505, indicates clearly that the court does not approve of the conduct complained of in this case. In *Silverman, supra,* the court held the evidence was inadmissible under the Fourth Amendment. A specific device used was a "spike mike" driven into the outer wall of Silverman's apartment, by which with the use of the electronic device, agents outside his apartment could hear conversations taking place therein.

Lopez v. United States, 373 U.S. 427 (May, 1963), indicates that *On Lee* is no longer authority for the use of equipment like that in this case. We direct the court's attention to Chief Justice Warren's opinion concurring with the majority, where he said:

> "Since I agree with Mr. Justice Brennan that the *On Lee* was wrongly decided and should not be revitalized, but base my views on grounds different

from those stated in the dissent, I have concurred specially. I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication constitute a grave danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments."

We strongly urge the court to render an opinion in this case in which the use of hidden electronic devices may be prohibited.

Subsidiary to this point, namely the use of electronic transmitting devices placed upon a person known to the person under investigation comes the proposition of whether or not the rules as laid down in *Escobedo v. Illinois,* 375 U.S. 902 and *Massiah v. United States,* 374 U.S. 805 are not controlling. In *Escobedo, supra,* the petitioner made incriminating statements while being interrogated by officers without an attorney present, and this was held to be in violation of his constitutional rights under the Sixth Amendment. (In the instant case the officers had equipped the man with a transmitting device, he had been sent to Battaglia's room in the hotel, and they had been informed apparently as to what questions they were to put to Battaglia.) The officer himself might as well have been in the room questioning Battaglia. In *Escobedo* the court stated in effect there was no distinction between interrogation before and after the indictment. The court stated:

"We hold only that when the process shifts from investigatory to accusatory—when it focuses on the accused, when its purpose is to elicit a con-

> fession—our adversary system begins to operate, and under the circumstances here the accused must be permitted to consult with his lawyer."

In the case at bar Battaglia, the investigatory process had actually been passed. As just pointed out, the men who went to Battaglia's room were equipped with the transmitting device; they had talked with the police; arrangements had been made then and there to trap Battaglia. The investigation was practically over; they were now at the accusatory stage seeking information and admissions from him which would convict him. Battaglia was by now a prime suspect and attention had focused upon him. Such conduct was condemned in *Massiah v. United States, supra.*

In closing this point, may we quote Mr. Justice Douglas as he importuned in his dissent in *On Lee, supra;*

> "The nature of the instrument that science or engineering develops is not important. A controlling, the decisive factor, is the invasion of privacy against the command of the Fourth and Fifth Amendments."

We realize that the courts sometimes are reluctant to digress from prior decisions and prior practice, but we believe that this case is an appropriate one. As was said in *Green v. United States,* 356 U.S. 165, at 195, in the dissenting opinion:

> "Ordinarily it is sound policy to adhere to prior decisions, but this practice has quite properly never been a blind, inflexible rule. Courts are not omniscient. Like every other human agency they too can profit from trial and error. from experience and reflection. As others have demonstrated, the principle commonly referred to as *stare decisis* has

never been thought to extend so far as to prevent the courts from correcting their own errors. Accordingly, this court has time and time again from the very beginning reconsidered the merits of its earlier decisions even though they claimed great longevity and repeated re-affirmation. See *Erie vs. Thompkins,* 304 U. S. 64; *Graves vs New York,* 306 U.S. 466, *Nye vs United States,* 313 U. S. 33, where it was said:

'I am quite willing that it be regarded hereafter as a law of this court that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported (quoting Chief Justice Taney in the passenger cases, 7 How. 283, 12 L.Ed. 781). Indeed, the court has a special responsibility where questions of constitutional law are involved to review its decisions from time to time and where compelling reasons present themselves to refuse to follow erroneous precedents.'"

In the instant case, the Circuit Court ruled that it was not error nor a violation of the constitutional rights of Battaglia to permit Sgt. Thompson to testify to the conversation overheard through the transmitting device. In support of its ruling, the court cited its own case of *Benson v. People of California,* 336 F. 2d 791 (9th Cir. 1964), as well as *United States v. Beno,* 333 F. 2d 669 (2nd Cir. 1964). It entirely disregarded the effect and language in the *Silverman* and *Lopez* decisions of this court. We submit that the decision in the instant case and in the cited decisions aforesaid are in conflict with the *Silverman* and *Lopez* decisions

and that this conflict should be resolved and the question settled, since it is an important question of law which affects the use of such devices by law enforcement officers. Moreover, the settlement of such question is important for the guidance of lower courts as well as to resolve the conflicts now existing.

In the instant case, the Circuit Court also ruled against the contentions of Battaglia that the admission of the evidence of Sgt. Thompson and of the tape recording of the transmitted conversation was in violation of the Sixth Amendment under the *Escobedo* and *Massiah* cases on the theory that Battaglia was neither in custody or under indictment, but was still participating in the criminal activity for which he was subsequently indicted. These statements are not consistent with the facts as pointed out above, nor are they consistent with the court's own ruling, in which it held that the unlawful association or conspiracy between Battaglia and his co-defendant Tenner "had been accomplished at least two months before the acts and statements embraced in Counts Three to Six occurred, and in which Tenner, alone, participated."

The alleged conspiracy between Battaglia and Tenner had terminated some time prior to the March 22nd occurrence, and hence there was no further criminal participation by Battaglia and there was no further investigatory process since it had reached the accusatory stage as shown that with the cooperation of the police, Williams and Warrens went to call upon Battaglia for the purpose of trapping him into making admissions [R. T. 299].

We submit therefore that this case falls directly within purview of the *Escobedo* and *Massiah* cases.

II.

This Court Should Grant Certiorari to Settle the Important Question Whether the Defendant Is Entitled to Inspect Any Document in the Possession of the Government Which Is Used by Any Government Witness to Refresh His Recollection Preliminary to His Testifying at the Trial, and Whether Refusal of the Prosecution to Permit Battaglia's Attorney to Inspect the Typewritten Transcript From Which Williams Refreshed His Recollection Before Testifying Was Not in Violation of Title 18, Section 3500, U.S.C. and a Denial to Petitioner of a Fair Trial and Due Process Under the Fifth Amendment of the Constitution.

In this instant case, as pointed out *supra,* a tape recording was made of the transmission of the conversations between Williams, Warrens and Battaglia. This tape recording, while introduced in part in evidence, was purportedly reduced to a typewritten transcript by the Government. Portions of the tape, especially with respect to statements made by Battaglia, were indistinguishable. Williams was permitted to refresh his recollection from the typewritten transcript just before testifying. Since his testimony was somewhat in conflict with that of Sgt. Thompson and of Warrens, the typewritten transcript from which he refreshed his recollection became very important. Nevertheless the Government, upon demand of Battaglia's counsel, refused to permit such inspection and the trial court sustained the Government's position. Its refusal to permit such inspection raises an inference that the typewritten transcript was not in accordance with the tape recording, and that gaps in the tape recording may have been filled in on the transcript.

The Circuit Court held that such denial was not in violation of *18 U.S.C., Section 3500* (the Jencks Act), because it was not a written statement made by the witness and signed or otherwise adopted or approved by him, or made to an agent of the Government.

We respectfully disagree with the holding, since Williams participated in the conversation from which the transcript of the tape recording was made, and hence, the statement, insofar as anything said by him was concerned, was his statement. The instant case comes within the rule laid down in the case *Jencks v. United States,* 353 U.S. 657. This Court in an exhaustive decision held that the statements of any Government witnesses must be produced, since the impeachment of their testimony is singularly important to the defendant, and that the failure to produce such statements or reports necessitates dismissal of the case.

In the case of *Jackson v. United States,* 250 F. 2d 897, it was held that where a witness has used a paper to refresh his recollection, the opposing side upon proper demand may examine the paper and use it for cross-examination. (*Montgomery v. United States,* 203 F. 2d 887; *United States v. Rappy,* 157 F. 2d 964.)

In the petition of *Massachusetts, Trustees, Etc.,* 200 F. Supp. 623, the court held that if a witness refreshes his recollection before taking the stand *from any document,* the cross-examiner is entitled to inspect so much thereof as bears directly upon the testimony given, whether it supports or contradicts such testimony.

In *Wigmore on Evidence,* 3rd Ed., Vol. 3, Section 762, page 108, the rule is stated that while a witness may refresh his recollection from a writing not prepared

by himself, if the opponent asks to see the writing and to cross-examine from it, his request must be granted. The purpose of the rule as stated by Wigmore is to avoid imposition and false aids. A number of cases have been cited in support of such rule:

Morris v. United States, 149 Fed. 123;

Taylor v. United States, 19 F. 2d 813;

Little v. United States, 93 F. 2d 401;

United States v. M. Craus & Bros., 149 F. 2d 713.

We submit that this court should grant certiorari, not only to determine whether in this case the use of the typewritten transcript was in violation of the Jencks Act, but whether denial of such inspection was a denial of due process under the Fifth Amendment of the Constitution.

III.

This Court Should Grant Certiorari to Settle the Important Questions as to Whether Portions of a Transcript of Testimony Given by a Defendant Before a Grand Jury Can Be Used for Any Purpose in the Trial of Said Defendant or His Co-Defendant, Where the Witness Was Not Represented by Counsel Before the Grand Jury or Advised of His Constitutional Rights, and Whether the Use of Such Grand Jury Testimony Is in Violation of the Fifth and Sixth Amendments of the Constitution.

In the instant case, Tenner, Battaglia's co-defendant, was called before the grand jury prior to the indictment and was not represented by counsel nor advised of his constitutional rights. Further, after Tenner first claimed the Fifth Amendment, he was advised or warned

by the United States Attorney, or even impliedly threatened, as follows:

> "I would warn you, Mr. Tenner, you are appearing before a grand jury, a grand jury appointed and selected by the law, by proper authorities in the Southern District of California."

After other statements as to the power of the grand jury made by U. S. Attorney, Tenner apparently did not stand upon the Fifth Amendment.

At the trial, Tenner took the stand and testified on behalf of himself and on behalf of Battaglia. The grand jury transcript then permitted to be read to the jury over objections of counsel [R. T. 631-642], impeached some of the testimony given by Tenner upon the stand. A motion to strike the testimony so read to the grand jury was denied [R. T. 667-672].

We submit that the use of such transcript was in violation of the rules of the *Massiah* and *Escobedo* cases, that this important question has never been passed upon with reference to testimony given by a prospective defendant before a grand jury. This court should therefore settle such important question as to whether testimony given by a prospective defendant before a grand jury when he is not represented by counsel is violative of the Fifth and Sixth Amendments of the United States Constitution, especially since at this time witnesses are not generally permitted to be represented by counsel at grand jury hearings.

IV.

Certiorari Should Be Granted Because the Conviction and Sentence of Petitioner Resulted From Proceeding and Evidence Admitted Concerning Acts and Statements of the Alleged Co-Conspirator and Co-Defendant Tenner Subsequent to the Time When the Conspiracy Terminated, Which Ruling Was in Conflict With Decisions of This Court and Calls for the Exercise of This Court's Power of Supervision.

Count I alleged as a basis for the indictment a wire fraud allegedly committed by the defendants on February 5, 1963, and sets forth nine overt acts, the last being that the defendant Harry Mellon requested $2,000 that would be wagered on a sure horse race. Count II makes the same allegations except in addition it alleged a telephone call made on March 11, 1963, from Burbank, in Los Angeles County to Las Vegas, Nevada. The remaining four counts had to do only with telephone conversations between the defendant Tenner and Warrens between May 27th and June 3, 1963. The evidence clearly showed that the alleged conspiracy, if any, between Tenner and Battaglia terminated with the incident on March 11th, and subsequent to March 27th there were no further communications or contacts between Battaglia and Warrens. There was thus no evidence to show any conspiracy between Battaglia and Tenner subsequent to said date, and the Circuit Court rightfully ruled that the conviction of Battaglia on Counts III through VI inclusive should be reversed for insufficiency of the evidence.

However, the trial court, over objection of counsel for Battaglia, permitted the introduction of evidence

concerning telephone and other conversations and acts of Tenner in the latter part of May and the early part of June, 1963. Some of the conversations took place between Tenner and FBI and other government agents. It also included statements made by Tenner before the grand jury at a much later date.

We submit that the admission of such evidence was highly prejudicial to Battaglia and denied him a fair trial and due process as required by the Fifth Amendment of the Constitution. With respect to such question the decision of the Circuit Court is in conflict with decisions of this court, notably *Kotteakos v. United States,* 328 U. S. 750, and *Krulewitch v. United States,* 336 U. S. 440. In the *Kotteakos* case this court condemned charges of multiple conspiracies and the proof of a group of single conspiracies under a charge of a one general conspiracy. In that case, there were eight different conspiracies of the same sort through a common key figure, one Simon Brown, and a large number of defendants. Only seven were convicted including petitioners. The Court stated, on page 764:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but slight effect, the verdict and judgment should stand, *except perhaps where the departure is from a constitutional norm,* or a specific command of Congress. . . . The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (Emphasis added.)

This court reversed the conviction of Kotteakos by reason of such multiple conspiracy charges.

In the instant case, the charges of conspiracy for the additional four counts was unwarranted, since the only evidence of a conspiracy involving Battaglia pertained to the first two counts only.

In the *Krulewitch* case the conviction of the petitioner for conspiracy was reversed, because the declarations and statements of a co-conspirator admitted into evidence, were made some time after the conspiracy had terminated or ended in failure. The Government contended that an implicit subsidiary phase of conspiracy survived which had concealment as its principal objective. The Circuit Court adopted this view, but the Supreme Court rejected the same, holding that statements made in furtherance of a going conspiracy are admissible, but not those made after the conspiracy ended.

Mr. Justice Jackson in his concurring opinion, page 445, stated:

> "In unavailing protest of the courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that this loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

He further stated, on page 453:

> "As a practical matter, the accused is confronted with a hodge-podge of acts and statements by others which he may never have authorized or in-

> tended or even thought about, but which helped to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon the assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction."

In the instant case, the trial court permitted over objection of Batagglia's attorney almost 20 Government witnesses to testify as to acts, statements and conversations had by or with Tenner from May 27th and thereafter, more than 2 months after the termination of the alleged conspiracy to violate the Wire Fraud Act as set forth in the first two counts. The prejudicial effect of the testimony of this imposing array of Government witnesses cannot be under-estimated, and undoubtedly resulted in the conviction of Battaglia, not only on the first two counts but on the remaining four counts concerning which there was no evidence against him.

The statements made by Tenner before the grand jury fall in the category and are governed by the rule that declarations or statements made by an alleged co-conspirator are not admissible if made subsequent to the termination of the conspiracy (*Krulewitch v. United States, supra*). Because of this prejudicial effect, we submit that this court in the exercise of its power of supervision should reverse the conviction of Battaglia on the two counts for which he now stands convicted. (There being no appeal on the part of the Government from the reversal by the Circuit Court on the last four counts.)

Conclusion.

In light of all of the above and foregoing, we respectfully request this court to issue its writ of certiorari to review the decision of the court below.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner.

APPENDIX "A".

Judgment and Commitment (Rev. 7-52).

United States District Court for the Southern District of California, Central Division.

United States of America v. John L. Battaglia. No. 32918-Criminal.

On this 2nd day of September, 1964 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of knowingly and wilfully transmitting and causing to be transmitted by wire, certain telephone calls for the purpose of executing schemes of fraud in violation of Title 18, United States Code, Sections 1343 and 2 as charged in Counts 1, 2, 3, 4, 5 and 6 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years as to each of Counts 1, 2, 3, 4, 5 and 6; sentence as to Counts 1, 2, 3 and 4 to run Con-

secutively; sentence as to Counts 5 and 6 to run Consecutively with each other and Concurrently with the sentence imposed in Counts 1 and 2.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Roger D. Foley, Jr.
United States District Judge.
Edward R. Davis, Deputy Clerk.

The Court recommends commitment to:

John A. Childress, Clerk
Filed: September 2, 1964.

APPENDIX "B".

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco, Calif. 94101

July 12, 1965

Burton Marks, Esq.
8447 Wilshire Blvd.
Beverly Hills, Calif.

Dear Sir:

In case No. 19513 Battaglia vs. U.S.A. an opinion was this day filed, in accordance with which a Judgment was filed and entered affirming in part, reversing in part, and remanding, etc. judgment of the Court below.

Pursuant to Rule 26, and unless the judgment is stayed by the order of the Court, or unless a petition for a rehearing of the cause be filed meantime, and as provided by Rule 23, a certified copy of the judgment of this Court will be due to issue on the expiration of 30 days from date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,

Frank H. Schmid,
Clerk.

APPENDIX "C".

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

John L. Battaglia, Appellant, vs. United States of America, Appellee. No. 19,513.

[July 12, 1965]

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Hamley and Jertberg, Circuit Judges, and Jameson, District Judge.

Jertberg, Circuit Judge:

Following trial to a jury, appellant and his codefendant, Harold Tenner, were convicted on all six counts of an indictment charging violation of Title 18 U.S.C.A. §§2, and 1343.[1] Tenner did not appeal.

This court's jurisdiction over the appeal is based upon 18 U.S.C.A. §§1291 and 1294(1).

---

[1]"§2. Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

"§1343. *Fraud by wire, radio, or television*

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits, or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Count One of the indictment in substance charges that beginning on or about January 15, 1963, and continuing until on or about June 7, 1963, John L. Battaglia (hereafter appellant) and Harold Tenner devised and intended to devise a scheme and artifice to defraud and to obtain money from John Kenneth Warrens (hereafter Warrens) by means of false and fraudulent pretenses, representations and promises; said scheme consisted of fraudulent representations concerning a past-posting scheme whereby Warrens would place wagers through appellant and Tenner with bookmakers in Las Vegas on horse races that had been completed; that Warrens was induced to pay over monies to appellant and Tenner by means of the false and fraudulent representations and promises which those charged well knew were false and fraudulent, and which schemes are set forth in Count One. Count One also alleges that on or about February 5, 1963, those charged, for the purpose of executing the scheme, transmitted and caused to be transmitted by means of wire, a telephone call from San Diego, California, to Las Vegas, Nevada.

Count Two realleges the allegations of Count One except the last mentioned communication by wire, and alleges that on or about March 11, 1963, those charged transmitted and caused to be transmitted by means of wire, a telephone call, from Burbank, California, to Las Vegas, Nevada.

We shall first consider appellant's contention that the evidence was insufficient to sustain convictions of appellant on Counts One and Two.

The evidence relating to Counts One and Two reflects the following: Warrens was approached by appellant in January, 1963. Appellant told him that he had certain

contacts at a Las Vegas bookmaker's office and at a race track which enabled him to place bets on a horse after it had won the race, and that he needed Warrens' participation because he was without sufficient funds and was unable to place bets in his own name. Warrens agreed to participate and delivered $5,000 to appellant and was told an employee of a Las Vegas bookmaker, "Harry Mellon", would be calling to confirm the deposit. "Harry Mellon" was in reality a Las Vegas home improvement salesman named Harold Tenner. Tenner telephoned Warrens from Las Vegas, confirmed the deposit, and told Warrens he was to call a certain telephone number in Las Vegas when he wished to place a bet. The number was that of the T & B Sales Company which was owned by Tenner. Later, after appellant had informed Warrens of the bet to place, Warrens telephoned Tenner and placed the bet. The horse lost. This procedure was repeated a second time in a similar fashion, Warrens hoping thereby to recoup his previous loss. This time he lost $14,000. At appellant's urging Warrens agreed to place still another bet and borrowed $9,000 from a friend, Williams, for this purpose, which amount was delivered to appellant by Williams. About a week later, and on March 22, 1963, Williams learned of Warrens previous bets and believing that Warrens was being "conned", induced Warrens to make a report to the San Diego police. On the same day, Williams and Warrens proceeded to the San Diego police station where they identified pictures of appellant, and Warrens told police officers that he had an appointment arranged for that afternoon with appellant at appellant's motel. The police officers equipped Warrens with an electronic transmitter which would broadcast to receiv-

ing and recording equipment that had been installed in a police truck. At the meeting in appellant's motel room, appellant discussed with Warrens and Williams the "past-posting" scheme and the three bets. This conversation was overheard and recorded by police officers in the nearby police truck, and testified to by Officer Thompson.

The following week appellant phoned several times to Warrens to reassure him with respect to the return of his money. No evidence was introduced of any further telephone conversations or other conversations or contact between appellant and Warrens.

Appellant argues that there is nothing in the record to establish that the money furnished by Warrens was not, in fact, bet and lost, and that there is evidence in the record that Warrens furnished the money to appellant in connection with a business transaction. In an interview between an F.B.I. agent and appellant, at which time counsel for appellant was present, appellant stated that neither he nor anyone else on his behalf had ever gambled with Warrens' money.

When viewed in the light most favorable to sustain the verdict, *Glasser v. United States,* 315 U.S. 60 (1942); *Mickelson v. United States,* ..... F.2d ..... (9th Cir. 1965), we find ample evidence upon which the jury could properly return verdicts of guilty as to Counts One and Two.

Appellant next contends it was error and a violation of his constitutional rights for the District Court to permit, over objection, Officer Thompson to testify as to the conversation which took place between Warrens,

Williams and appellant, which he overheard while recording the conversation while in the nearby police truck.

All of the authorities cited by appellant in support of his contention have previously been considered by us at some length in regard to similar contentions made in *Benson v. People of California,* 336 F.2d 791 (9th Cir. 1964), C.D. 380 U.S. 951 (1965). We adhere to what we there said and, accordingly, find no error. See, *United States v. Beno,* 333 F.2d 669 (2d Cir. 1964).

Appellant further objects to the admission of this evidence in reliance upon *Escobedo v. Illinois,* 378 U.S. 478 (1964), and *Massiah v. United States,* 377 U.S. 201 (1964), on the ground that no attorney for appellant was present at the time the conversation took place.

In *Escobedo,* the admissions were made while the defendant was under arrest and although his attorney was in an adjoining room of the police station, each was denied access to the other. In *Massiah,* the statements were obtained during the inquisitorial stage of the proceedings after the defendant had been indicted and in the absence of his retained attorney. Here, on the other hand, appellant was neither in custody nor under indictment. Instead, he was still participating in the criminal activity for which he was subsequently indicted. "One is not entitled to counsel while committing the crime . . .". *Grier, et al. v. United States,* ..... F.2d ..... (9th Cir. 1965). See, *United States v. Beno, supra.*

Appellant argues that it was error to admit into evidence a tape recording of the telephone conversation between appellant and Warrens which was obtained with the consent of Warrens by means of an induction coil

attached to his telephone. It is argued that its admission into evidence was in violation of Sec. 605 of the Federal Communications Act, 47 U.S.C.A. 2.[2]

Sec. 605, however, is not applicable if a communication is monitored, as this was, with the consent of one of the communicating parties. *Rathbun v. United States,* 355 U.S. 107 (1957); *Lindsey v. United States,* 332 F.2d 688 (9th Cir. 1964); *United States v. Campbell,* 337 F.2d 396 (7th Cir. 1964).

Appellant's distinction that this means of recording the conversation by use of an induction coil takes the case out of the *Rathbun, supra,* context is not valid for the mechanical nature of the method of overhearing of the conversation is not critical. *Carbo v. United States,* 314 F.2d 718, 739 (9th Cir. 1963).

Appellant's contention that the recording of the conversation without advance notice to appellant and without the use of a tonewarning device as required by an order of the Federal Communications Commission is answered by *Ferguson v. United States,* 307 F.2d 787 (10th Cir. 1962), Opinion withdrawn on other grounds, 329 F.2d 923 (10th Cir. 1964). There the court said at p. 790:

> "* * * a regulation or order directed to the carriers over whom the Federal Communications Commission has jurisdiction, 47 U.S.C.A. §152, cannot

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[2]"Section 605 states in pertinent part:

"* * * [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *."

be viewed as creating a new crime prohibited to the citizenry nor as changing the rules of evidence evolved in the federal courts."

On cross-examination of Williams, a prosecution witness, who testified on direct examination to the conversations which occurred at appellant's motel room on March 22, 1963, counsel for appellant inquired if the witness had listened to the tape recording of the conversation. The witness replied that he had, several months prior to the trial. Williams also stated that he had also refreshed his memory from a typed transcript of a portion of the tape on the day before the trial. Counsel for appellant requested to inspect the transcript. Such request was denied by the District Court on the ground that defense counsel "has had an opportunity on two occasions to hear the tape recording in full." The record supports the District Court's statement. Appellant contends that the denial to inspect said transcript was in violation of 18 U.S.C. §3500—the Jencks Act. We believe that the transcript does not come within the purview of the Jencks Act since it was not a written statement made by the witness and signed or otherwise adopted or approved by him, made to an agent of the government; or a stenographic, mechanical, electrical or other recording or transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Apart from the Jencks Act, the denial of such inspection, if error, is harmless error when viewed in the light of the entire record.

Co-defendant Tenner testified on his own behalf. Some of the testimony given was in conflict with his

testimony before the Grand Jury. On cross-examination, over the objection of counsel for appellant, Government counsel was permitted to read portions of the Grand Jury transcript to impeach Tenner.

Appellant contends that Tenner's constitutional rights were violated because Tenner testified that he was not represented by an attorney before the Grand Jury nor did he consult with an attorney prior to going before the Grand Jury. Appellant relies upon *Massiah v. United States, supra,* and *Escobedo v. Illinois, supra.* We see no violation of appellant's constitutional rights in connection with the efforts of the Government to impeach the credibility of Tenner.

Finally, appellant contends that the Government counsel was guilty of misconduct in two particulars in his opening and closing arguments to the jury, and that the court erred in the giving and refusal of certain instructions. We believe that the remarks of Government counsel in his arguments to the jury were within the area of fair comment. In connection with appellant's assignment as to instructions, we note that appellant has neither set out the questioned jury instructions nor has he specified his objection in the trial court. There is a complete failure on the part of appellant to comply with the provisions of Rule 18 (2) (d) of the Rules of this Court which provide, in pertinent part, as follows:

> ". . . When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused, together with the grounds of the objections urged at the trial."

The judgments of conviction of appellant as to Counts One and Two are affirmed.

We agree with the appellant that the evidence is insufficient to support the verdict of guilty as to Counts Three, Four, Five and Six. Count Three of the indictment reads as follows:

"COUNT THREE

[18 USC, §§ 1343 and 2]

"The Grand Jury realleges all of the allegations in Count One of this indictment except those contained in the last paragraph thereof.

"On or about May 27, 1963, at approximately 10:00 A.M., the defendants JOHN L. BATTAGLIA and HAROLD TENNER, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, transmitted and caused to be transmitted by means of wire, a telephone call, from Reno, Nevada to San Diego, in San Diego County, within the Southern Division of the Southern District of California."

Counts Four, Five and Six are the same as Count Three except that the dates of the offenses alleged are May 27, 1963, May 29, 1963, and June 3, 1963, respectively.

There is no dispute that the telephone call on May 27, 1963, referred to in Count Three; the telephone call on May 27, 1963, referred to in Count Four; the telephone call on May 29, 1963, referred to in Count Five; and the telephone call on June 3, 1963, referred to in Count Six were between Tenner and Warrens. The Government concedes that there is no evidence in the

record of contacts or communications between appellant and Warrens after the last week of March, 1963, but contends that since the evidence is sufficient to sustain the convictions of appellant and Tenner under Counts One and Two, the acts and statements of Tenner, referred to in Counts Three through Six, are binding upon appellant in the absence of evidence of some affirmative act on the part of appellant disassociating himself from the scheme to defraud, mentioned in Counts One and Two. While we recognize the rule contended for by the Government, we believe that it has no application to a situation such as exists in this case where it appears that the main purpose of the unlawful association between appellant and Tenner had been accomplished at least two months before the acts and statements embraced in Counts Three to Six occurred, and in which Tenner, alone, participated.

The judgments of conviction of appellant on Counts One and Two are, and each of them is, affirmed. The judgments of conviction of appellant on Counts Three, Four, Five and Six are, and each of them is, reversed. The cause is remanded to the District Court with instructions to vacate and set aside the sentences imposed upon appellant on said last mentioned Counts, and to order the dismissal of said Counts as to the appellant.

APPENDIX "D".

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco 1, Calif.

Aug. 6, 1965

Burton Marks, Esq.
Attorney at Law
8447 Wilshire Blvd.
Beverly Hills, Calif.

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 19513—Battaglia v. USA was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,

Frank H. Schmid,
Clerk.

APPENDIX "E".

Constitutional Provisions and Statues Involved.

The defendants were convicted under §§ 2 and 1343, Title 18, U.S.C. §2 provides as follows:

"PRINCIPALS (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

§1343 provides as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures of sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1000.00 or imprisoned not more than five years, or both."

FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, * * *

FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty, or property, without due process of law, * * *.

SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

In all criminal prosecution, the accused shall enjoy the right * * * to have the assistance of Counsel for his defense.

Title 18, §3500, U.S.C.

§3500. Demand for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the

United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order to be delivered directly to the defendandt for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The Term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 534

JOHN BATTAGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C4–13; 1 R. 144–151)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1965 (Pet. App. A1–2; 1 R. 152). A petition for rehearing *en banc* was denied on August 6, 1965 (1 R. 163). The petition for a writ of certiorari was filed on September 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R.", preceded by volume number, designates the five-volume record on file with the Clerk of this Court.

QUESTIONS PRESENTED

1. Whether testimony of a recorded conversation between petitioner and the victims of his scheme to defraud was admissible into evidence.

2. Whether petitioner was prejudiced by the impeachment of a codefendant through the use of a portion of the codefendant's grand jury testimony.

3. Whether petitioner was prejudiced by the denial of inspection of a partial written transcript of a recording of a conversation, where defense counsel had twice heard the actual recording.

4. Whether the reversal of petitioner's conviction on certain counts required reversal on all counts.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on each count of a six-count indictment charging that he and one Harold Tenner used interstate wires in a scheme to defraud Dr. John Kenneth Warrens (1 R. 2–9; 5 R. 819–821). Petitioner was originally sentenced to a total of twenty years' imprisonment (1 R. 127–129) but, because of the reversal of several counts by the court of appeals, his sentence was reduced to ten years, five years on count one and five years on count two (1 R. 151).[1]

1. The government's evidence on count one and two—the sufficiency of which is not in dispute—

[1] Harold Tenner was convicted on each of the six counts (5 R. 820–821) and was sentenced to a total of six months' imprisonment to be followed by five-years' probation (1 R. 127). He did not appeal his conviction.

showed that in January, 1963, petitioner told Dr. John Warrens, a San Diego dentist, that, by virtue of his contacts at a bookmaking establishment in Las Vegas and at a local track petitioner could make winning bets on horse races after they had been run (2 R. 31–33). Warrens agreed to participate in the scheme and gave petitioner $5,000. Petitioner later told Warrens that he had deposited the money with an employee of a Las Vegas bookmaker, whom he identified as "Harry Mellon" (in reality, codefendant Harold Tenner (3 R. 265–270; 4 R. 534, 564; 5 R. 614, 616)) who would telephone Warrens to confirm the deposits (2 R. 34). A few days later, Tenner, using the name "Mellon," telephoned Warrens from Las Vegas, verified the deposit, and instructed Warrens that, when he was ready to place a bet, he should call a certain telephone number in Las Vegas and request the girl who answered to have "Harry Mellon" call "J.W.S." as soon as possible (2 R. 34–35).[4]

Petitioner told Warrens that a bet would be placed on February 5, 1963 and that Warrens should arrange to have two unoccupied public telephone booths available "side by side"—one to receive petitioner's telephonic information identifying the horse to bet on and another to telephone that information to the Las Vegas contact (2 R. 36–38). On February 5, petitioner telephoned Warrens and gave him the betting information (2 R. 38). Warrens immediately telephoned Las Vegas, and when "Mellon" returned the

[4] This telephone number was actually that of the answering service of the T & B Sales Company in Las Vegas, a business owned by Tenner (4 R. 490–492, 539–544; 5 R. 623–624).